82-354

No. 82-

Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

August 30, 1982

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General
Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General
Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA *
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals, when reviewing the exercise of the Secretary of Transportation's discretion under the National Traffic and Motor Vehicle Safety Act of 1966 to determine the content of "appropriate" safety standards, invalidate as arbitrary and capricious the Secretary's decision to rescind his earlier regulation setting prospective passive restraint requirements because the court finds that decision to violate a congressional "mandate" the court divines from congressional rejection of bills that would have required or prohibited passive restraints and rejection of resolutions that would have vetoed the earlier regulation?

2. When a court of appeals concedes that an agency's reasons for rescinding prospective passive restraint requirements would justify declining to adopt such requirements in the first instance, may the court reject these same reasons as arbitrary and capricious when used to support the agency's decision to rescind the requirements it had previously issued?

3. When an agency finds that changed circumstances create "substantial uncertainty" whether a previously issued regulation will achieve its purpose, may the court declare the agency's decision to rescind that prospective regulation arbitrary and capricious solely because the agency could not find that the regulation would *not* achieve its purpose?

4. May a court of appeals invalidate an agency's rescission of its own prospective regulation as arbitrary and capricious because the agency failed to consider regulatory alternatives that were neither raised by the agency's notice of proposed rulemaking nor foreclosed by the agency's rescission order under review?

5. Is it an unlawful invasion of the primary jurisdiction of an agency for a court of appeals, after remanding

an agency's rescission of its own regulation for further agency consideration, to reverse its own order and reinstate the regulation by a date certain, regardless of whether the further agency proceedings have been completed, and regardless of how the agency might resolve the issues remanded?

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Drew Lewis, the National Highway Traffic Safety Administration, and Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Summary History of Standard 208	3
B. NHTSA's Decision in This Case	6
C. The Decisions of the Court of Appeals	9
REASONS FOR GRANTING THE WRIT	11
I. Through Its Admittedly "Unusual" and Unprecedented Use of Post-Enactment Legislative Events, the Court Below Ignored the Prerogative of Congress To Delegate Discretion To Issue Appropriate Safety Standards to the Secretary and Improperly Broadened the Limits of Arbitrary and Capricious Review	11
II. By Imposing Its Own Policy Preference That Regulations Must Remain in Place Unless They Can Be *Proven* Ineffective, the Court Below Has Posed a Serious Challenge to the Continued Ability of Administrative Agencies To Exercise Their Delegated Statutory Authority	17
III. The Court's August 4 Order Impermissibly Preempted the Agency's Primary Jurisdiction To Make the Further Determinations Required by the Court's Opinion	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases: Page

American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 22
American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967) 18
Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092 (5th Cir. 1976) 28
Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade, 412 U.S. 800 (1973) 19, 27, 28
Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) 12
Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281 (1974) 14
Center for Science in the Public Interest v. Department of the Treasury, Civil Action No. 82-0610 (D.D.C.) 25
Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3244 (U.S. October 5, 1981), *restored for reargument*, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982) 15
Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) .. 19
Chrysler Corp. v. DOT, 472 F.2d 659 (6th Cir. 1972) 4, 23, 27
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 14, 16
City of San Antonio v. CAB, 374 F.2d 326 (D.C. Cir. 1967) 22
Consolidated Rail Corp. v. National Association of Recycling Industries, Inc., 449 U.S. 609 (1981) .. 28
CPSC v. GTE Sylvania, Inc., 447 U.S. 102 (1980) .. 16
Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) 16
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 14
FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 21, 22
FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976) 27
FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974 (1977) 19, 20

TABLE OF AUTHORITIES—Continued

	Page
Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979)	19
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir.), *cert. denied*, 402 U.S. 923 (1971)	16
Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980)	14, 22
International Ladies' Garment Workers Union v. Donovan, Civil Action No. 81-2606 (D.D.C. July 23, 1982)	25
Long Island R.R. v. Aberdeen & Rockfish R.R., 439 U.S. 1 (1978)	28
NAACP v. FCC, No. 80-2416 (D.C. Cir. June 29, 1982)	19
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	19
NLRB v. Iron Workers Local 103, 434 U.S. 335 (1978)	18
NLRB v. Pipefitters Local 638, 429 U.S. 507 (1977)	27
National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974)	18
National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819 (D.C. Cir. 1980)	13
Natural Resources Defense Council, Inc. v. EPA, No. 81-2068 (3d Cir. July 8, 1982)	24, 25
Natural Resources Defense Council, Inc. v. Gorsuch, No. 81-2208 (D.C. Cir. August 17, 1982)	18, 24
Office of Communication of the United Church of Christ v. FCC, Nos. 81-1032 *et al.* (D.C. Cir.)	24
Pacific Legal Foundation v. DOT, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979)	4, 6, 20
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	18
REA Express, Inc. v. United States, 568 F.2d 940 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978)	22
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	16

TABLE OF AUTHORITIES—Continued

	Page
SEC v. Chenery Corp., 332 U.S. 194 (1947)	19
TVA v. Hill, 437 U.S. 153 (1978)	16
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	13, 16, 22, 27
Washington Association for Television and Children v. FCC, 665 F.2d 1264 (D.C. Cir. 1981)	28
Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)	13
Constitutional Provisions:	
U.S. Const. amend. V	19
Statutes:	
Administrative Procedure Act, ch. 324, 60 Stat. 237	*passim*
Section 10(e)(B)(1), 5 U.S.C. § 706(2)(A)	12, 13, 14, 16
Section 10(e)(B)(3), 5 U.S.C. § 706(2)(C)	13, 14
Section 10(e)(B)(4), 5 U.S.C. § 706(2)(D)	13
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705	24
Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374	24
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793	24
Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, 88 Stat. 1470	5, 14, 15
Section 106, 15 U.S.C. § 1410a	23
Section 109, 15 U.S.C. § 1410b	5, 11, 15
National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718	*passim*
Section 102, 15 U.S.C. § 1391	3, 23, 26
Section 103, 15 U.S.C. § 1392	3, 11, 26
Section 105, 15 U.S.C. § 1394	2, 3
Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351	24
Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812	24

TABLE OF AUTHORITIES—Continued

	Page
Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164	24
28 U.S.C. § 1254(1)	2
Legislative Materials:	
H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982)	13
Administrative Regulations:	
49 C.F.R. § 501.2(a)	5
49 C.F.R. § 571.208	*passim*
Administrative Orders and Decisions:	
Deregulation of Radio, 84 F.C.C.2d 968 (1981)	24, 25
DOT, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection (December 6, 1976)	5
Executive Order No. 12291, 46 Fed. Reg. 13193 (1981)	24
32 Fed. Reg. 2408 (1967)	4
34 Fed. Reg. 11148 (1969)	4
39 Fed. Reg. 14593 (1974)	4
40 Fed. Reg. 13330 (1975)	5
40 Fed. Reg. 16217 (1975)	5
40 Fed. Reg. 21063 (1975)	5
41 Fed. Reg. 24070 (1976)	4, 5
42 Fed. Reg. 5071 (1977)	5, 9
42 Fed. Reg. 15935 (1977)	6
42 Fed. Reg. 34289 (1977)	6
43 Fed. Reg. 52493 (1978)	4
46 Fed. Reg. 21205 (1981)	*passim*
46 Fed. Reg. 53419 (1981)	*passim*
47 Fed. Reg. 36453 (1982)	24
Miscellaneous:	
Presidential Task Force on Regulatory Relief: Reagan Administration Achievements in Regulatory Relief (August 1982)	24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Motor Vehicle Manufacturers Association of the United States, Inc., the Automobile Importers of America, Inc., and six leading manufacturers of passenger cars,[1] respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered June 1, 1982, and the subsequent Order and Memorandum of that court issued August 4, 1982.

---

[1] The manufacturer petitioners are American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc. A list of parent companies, subsidiaries, and affiliates of each of these member companies is set forth in App. J.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case, *State Farm Mutual Automobile Insurance Co. v. DOT*, 680 F.2d 206 (D.C. Cir. 1982), is reproduced at App. 1a. The court's subsequent unpublished Order and Memorandum of August 4, 1982 are reproduced at App. 79a. The decision of the National Highway Traffic Safety Administration ("NHTSA"), 46 Fed. Reg. 53419 (1981), is reproduced at App. 88a.

JURISDICTION

Jurisdiction to review the court of appeals' June 1 judgment and its subsequent August 4 order is vested in this Court by 28 U.S.C. § 1254(1), as further provided in 15 U.S.C. § 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706, and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("Safety Act"), are set forth at App. 162a, 163a.

STATEMENT OF THE CASE

Federal Motor Vehicle Safety Standard 208 ("Standard 208") currently requires that motor vehicle manufacturers install "active" seatbelt restraints in all passenger cars. This case arises out of an October 1981 decision by NHTSA to rescind those prospective provisions of Standard 208 that would have required installation of "passive" restraints beginning in September 1982.[2] NHTSA's decision was based on its determination that new circumstances arising after the stand-

[2] "Passive" restraints are defined by NHTSA as those occupant restraint systems that afford protection in frontal crashes "by means that require no action by vehicle occupants." 49 C.F.R. § 571.208 (S4.1.3(a)) (1981). The terms "passive" and "automatic" are sometimes used interchangeably. The seatbelts presently required by Standard 208 as standard equipment in all passenger cars are referred to as "active" restraints.

ard was issued created substantial uncertainty about the probable usage rates of passive restraints and that because of this uncertainty a standard requiring their installation in all cars was not justified under the statutory mandate that safety standards be reasonable, practicable, and meet the need for motor vehicle safety. On the petition of certain automobile insurance companies and others under 15 U.S.C. § 1394(a)(1), NHTSA's decision was invalidated by the United States Court of Appeals for the District of Columbia Circuit as "arbitrary and capricious," and remanded for further consideration of certain issues before any final agency decision to maintain, amend, suspend, or rescind the passive restraint requirements. In a subsequent order of August 4, 1982, the court of appeals *sua sponte* made those requirements effective on September 1, 1983, subject to further consideration of any request by NHTSA to extend that effective date. App. 79a.

A. Summary History of Standard 208

The agency's October 1981 decision followed a long and sharply disputed regulatory debate about the measures appropriate, under NHTSA's statutory authority to issue federal motor vehicle safety standards,[3] to reduce the

---

[3] The Safety Act authorizes the Secretary of Transportation to issue "appropriate" federal motor vehicle safety standards. 15 U.S.C. § 1392(a). The Act requires that any safety standard "shall be practicable, shall *meet the need for motor vehicle safety*, and shall be stated in objective terms," *id.*, and defines motor vehicle safety in terms of protection against "*unreasonable risk*," *id.* § 1391(1) (emphasis supplied). The Act further requires that, "[i]n prescribing [such] standards," the Secretary shall consider "whether any such proposed standard is *reasonable, practicable and appropriate* for the particular type of motor vehicle . . . for which it is prescribed" as well as "the extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.* § 1392(f) (emphasis supplied). The Act empowers the Secretary to "amend or revoke" any such standard previously issued. *Id.* § 1392(e).

risk of deaths and injuries in the event of a collision. Originally, Standard 208 simply required manufacturers to install seatbelts.[4] This requirement, which is unaffected by the decision under review, affords roughly the same level of protection as passive restraints for those motorists who "buckle up" their seatbelts.[5] However, because historically "only a very low percentage of the motoring population" has actually used seatbelts,[6] the agency commenced a series of further actions to bring about the use of passive restraints. In 1969, the agency proposed to make installation of passive restraints mandatory by specified future dates. Subsequently the dates were postponed, and ultimately the passive restraint requirement was rescinded.[7]

Three major events marked the last eight years of this history.[8] To encourage the use of "active" seatbelts be-

---

[4] 32 Fed. Reg. 2408, 2415 (1967).

[5] 41 Fed. Reg. 24070, 24071 (1976). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1345 n.53 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[6] 34 Fed. Reg. 11148 (1969).

[7] The principal passive restraint technologies developed to date are airbags and passive belts that are detachable. Passive belts that are detachable are those that may be separated once buckled up, usually by a conventional push-button that separates the continuity of belt webbing, as in the "active" belts currently installed in passenger cars. In 1974, NHTSA adopted a rule mandating detachable belts, in light of concerns about emergency egress in a crash. 39 Fed. Reg. 14593 (1974). Later, NHTSA permitted passive belts to include a release feature allowing the belt to "play out" in an emergency, 43 Fed. Reg. 52493 (1978), and one such belt is currently being offered on one line of cars by one manufacturer.

[8] The principal event in the earlier years was the Sixth Circuit's decision in *Chrysler Corp. v. DOT*, 472 F.2d 659 (6th Cir. 1972), upholding the agency's authority to issue a passive restraint standard, and its discretion to require passive over active restraints, but remanding the standard because the compliance testing procedures did not meet the Safety Act's requirement that standards provide "objective criteria."

fore the dates when passive restraints were to become mandatory, NHTSA required the installation of ignition interlocks and continuous buzzers. Because of strong public objection to these devices, Congress amended the Safety Act in 1974 to prohibit any standard that would permit compliance by use of any such device. Congress also provided that any passive restraint requirement that would permit compliance by means of an airbag would be subject to a legislative veto procedure. 15 U.S.C. §§ 1410b(c)-(d). *See* App. 33a-35a.

After enactment of the 1974 amendments, NHTSA thoroughly reviewed its passive restraint policy, noting that "[a] decision has not yet been made on the long-term requirements for occupant crash protection."[9] In December 1976, Secretary of Transportation Coleman decided to continue the existing active restraint requirements "for the indefinite future." 42 Fed. Reg. 5071 (1977).[10] He postponed indefinitely the phased effective dates of the passive restraint requirements, and initiated a voluntary large-scale demonstration program "to exhibit the effectiveness of passive restraint[s]" before they were made mandatory for all new cars. *Id.*[11] A number of the principal manufacturers agreed to produce and offer for sale sufficient cars equipped with passive restraints to carry out the program.

---

[9] 40 Fed. Reg. 16217 (1975). *See also* 40 Fed. Reg. 13330 (1975); 40 Fed. Reg. 21063 (1975); 41 Fed. Reg. 24070 (1976).

[10] The Secretary has delegated his statutory authority under the Safety Act to the Administrator of NHTSA, 49 C.F.R. § 501.2(a) (1981), but from time to time the Secretary has personally made decisions concerning passive restraints.

[11] The Coleman decision was premised on the belief that NHTSA should not risk a "poisoning of popular sentiment" toward future regulation by imposing a passive restraint requirement over the clear opposition of most of the driving public, and on the hope that a demonstration program could foster greater public familiarity with and acceptance of passive restraints. DOT, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection 6-7 (December 6, 1976).

The Coleman demonstration program never materialized. Shortly after succeeding Coleman, Secretary Adams abrogated this program by reproposing passive restraints. 42 Fed. Reg. 15935 (1977). Retracing Coleman's steps, Adams endorsed the Coleman findings on the feasibility, practicability, costs, and life-saving potential of passive restraints as "in all substantial respects correct." 42 Fed. Reg. 34289, 34291 (1977). But Adams concluded that imposing passive restraints by regulatory mandate "is the logical result of those findings." *Id.* Like Coleman, Adams assumed that the principal method of compliance would be by means of airbags, and made no finding concerning whether the detachable passive belts also permitted under his order would actually be used. *Id.* at 34298 & nn. 6-7.[12]

B. NHTSA's Decision in This Case

In April 1981, Secretary Lewis issued a notice of proposed rulemaking initiating the action presently under review. 46 Fed. Reg. 21205 (1981) (App. 147a). Lewis observed that the Adams decision "was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid." App. 150a. The foremost of these was that the agency had "assumed" that consumers would voluntarily use either airbags or passive belts, whichever the manufacturer elected to install. The Adams decision had predicted that 60 percent of passive restraint systems to be installed by manufacturers would be airbag systems; yet Lewis concluded in 1981 that as a result of consumer wariness concerning airbags and reluctance to pay their high costs, "[c]urrent manufacturer plans contemplate almost no installation of airbags, only about 1 percent of the total fleet of new cars." *Id.*[13]

---

[12] Adams' decision was upheld in *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[13] Lewis further noted that NHTSA had not "anticipate[d] that the switch [from large to small cars] would occur as rapidly as it has, due in large measure to the subsequent oil cut-off of

Because of a concern about "the unlikelihood of public acceptability" of the planned passive restraints (App. 154a), Lewis proposed three possible alternatives, including rescission of the mandatory requirement. The agency also decided to "undertake an intensive public education campaign to induce the public to use their [active] safety belts." App. 152a.

After considering public comments on these proposals, NHTSA elected to rescind the passive restraint requirements. 46 Fed. Reg. 53419 (1981) ("Notice 25") (App. 88a). The agency concluded that "the post-1977 events have rendered it incapable of finding now, as it was able to do in 1977," that passive restraints "would meet all of the applicable criteria" imposed by the Safety Act. App. 93a. It found that 1977 calculations of the benefits of passive restraint requirements "have been substantially if not wholly undermined by drastic changes" in the regulatory environment. App. 96a. Because in 1977 Adams had expected airbags to be the principal method of compliance, he had simply "assumed"—without any proof or findings—that the automatic belts installed in the remaining minority of cars "would be used by 60 to 70 percent of the occupants of those cars." App. 95a. But since compliance with the passive restraint requirements now appeared almost surely to be in the form not of airbags but of passive belts that were detachable, "public reaction to and usage rate of detachable automatic belts" had now become "the most important issue." App. 94a. NHTSA's concerns were heightened because of the

---

1979." In 1977, NHTSA had predicted an early 1980's size mix of 23 percent large cars, 53 percent mid-size cars, and 24 percent small cars. "Now," Lewis explained, "the expectation is that [the] new car fleet will consist of 1 percent large cars, 58 percent mid-size cars and 41 percent small cars." App. 151a. These changes had substantial impact on the production costs, and therefore the public acceptability, of airbags.

great costs associated with mandatory passive restraints,[14] and the risk "that adverse public reaction could undermine the effectiveness of both the standard itself and future or related efforts." App. 114a.

NHTSA carefully scrutinized the data on the issue of incremental usage of detachable passive belts in certain cars, and explained in detail why this data did not support any reliable prediction about usage rates for mandatory passive belts. App. 95a-104a. As a result, NHTSA could not "reliably predict even a 5 percentage point increase as the minimum level of expected usage increase." It concluded that "[t]he adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts." App. 104a.

NHTSA found that "[t]his uncertainty and the relatively substantial cost of automatic restraints preclude the agency from determining that the standard is at this time reasonable and practicable" (App. 88a), or that the prospective passive restraint requirements "in their present form meet the need for safety" (App. 104a), as required by the Safety Act,[15] particularly in light of the need to foster public acceptability of the standard. App. 107a-109a. Accordingly, it determined to "rescind" the prospective requirements for mandatory passive re-

---

[14] NHTSA noted that the average price increase per car expected from passive restraints was $89. Given the total annual production of more than 10 million cars, this increase would mean a price effect of close to $1 billion, not all of which could be passed on to consumers, who could not be expected to be compensated for those substantial increases by decreased insurance premiums. The agency noted that comments from insurance companies "state that they could not now assure reductions in insurance premiums but would have to first collect a considerable amount of claim data." App. 105a-106a.

[15] *See* note 3 *supra*.

straints. Like Secretary Coleman in 1976,[16] the agency observed that rescission "does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize" (App. 115a) as a result of NHTSA's planned educational campaign to foster seatbelt usage.

C. The Decisions of the Court of Appeals

On June 1, 1982, the court of appeals set aside NHTSA's decision not to impose the mandatory passive restraint requirements at this time. The court held that the "arbitrary and capricious" standard of review applicable in this case "should be given different scope in different contexts." App. 29a. It cited two relevant "contexts" in this case. First, although it never suggested that NHTSA's decision violated the Safety Act itself (App. 31a), the court divined from three later instances of legislative refusal to ban or to require a passive restraint standard congressional "approval" of such a standard. App. 32a, 33a-46a, 74a. It then held that this "approval" imposed a burden upon NHTSA to show by "increasingly clear and convincing reasons" why it "depart[ed] from the path marked by Congress." App. 48a. Second, the court viewed the decision to rescind a regulation once issued as requiring substantially greater justification than a decision not to adopt it in the first instance. Although it upheld each of NHTSA's findings about the factual changes that had occurred since the regulation had been issued (App. 50a-51a), it rejected as insufficient the agency's finding that these changes created "substantial uncertainty" about in-

---

[16] In postponing the effective date of the passive restraint requirements in December 1976, Secretary Coleman emphasized that "I have not in any way foreclosed a future Secretary . . . from [determining] . . . either to place a termination date on Standard No. 208 or to mandate passive restraints on some or all passenger cars." 42 Fed. Reg. at 5071.

creased usage rates for detachable passive belts. "NHTSA has some burden," it held, "to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so"; this burden precluded rescission unless the agency relied on evidence affirmatively showing that usage rates would not "increase by the necessary amount . . . ." App. 51a.[17] The court held that it was "arbitrary and illogical" to rescind—rather than "to suspend or amend"—passive restraint requirements without "evidence that seatbelt usage will fail to increase as was expected" in 1977. App. 49a, 54a. The majority also held that it was arbitrary to rescind while failing to "consider or analyze obvious alternatives to rescission." App. 49a.[18]

In remanding, the court specifically "declin[ed] the suggestions" of petitioners below that it order the passive restraint provisions into effect by September 1982 or September 1983. App. 72a. The court said its remand "d[id] not foreclose" rescission or suspension consistent with its opinion. *Id.* *See also* App. 54a. The court required the agency to submit to the court within 30 days "a schedule for resolving the questions raised in this opinion . . . ." App. 74a.

---

[17] In three separate parts of its opinion, the court mistakenly stated that NHTSA had found that passive restraint requirements would fail to increase seatbelt usage by 13 percentage points. *See* App. 17a, 51a, 53a-54a. NHTSA made no such findings. Its actual finding on this question is quoted above. *See* page 8 *supra*. At a fourth point, the court similarly asserted that the agency had "repeatedly emphasized" that any increase in usage from detachable passive belts "would be 'extremely small . . . .'" App. 21a. The passage partially quoted by the court is actually an agency finding that "*If* the percentage increase is zero or extremely small . . . , data regarding manual belt usage would be reliable as a guide . . . ." App. 104a (emphasis supplied).

[18] In concurring with Judge Mikva's majority opinion, Judge Edwards "d[id] not accept" the failure to consider these alternatives "as a basis for decision in this case." App. 75a.

NHTSA thereupon filed a proposed schedule for further agency action on July 1, 1982. App. 130a.[19] On August 4 the court denied motions for extension of time to file rehearing petitions, directing that "the mandate [for the June 1 judgment] of the Court will therefore issue accordingly." App. 85a. On August 4 the court also held that NHTSA's proposed schedule was "not inconsistent with the Court's order" of June 1. Nevertheless, in spite of its previous rejection of a September 1, 1983 effective date, and its previous refusal to set any effective date itself, it now held that "Standard 208 remains fully in force," and "stayed" the effective date of the standard's mandatory passive restraint requirements only until September 1983. App. 80a, 81a. It gave NHTSA until October 1, 1982 "to advise the Court . . . whether a longer period is required, setting forth adequate reasons therefor." App. 80a.

REASONS FOR GRANTING THE WRIT

I. THROUGH ITS ADMITTEDLY "UNUSUAL" AND UNPRECEDENTED USE OF POST-ENACTMENT LEGISLATIVE EVENTS, THE COURT BELOW IGNORED THE PREROGATIVE OF CONGRESS TO DELEGATE DISCRETION TO ISSUE APPROPRIATE SAFETY STANDARDS TO THE SECRETARY AND IMPROPERLY BROADENED THE LIMITS OF ARBITRARY AND CAPRICIOUS REVIEW.

As the court of appeals stressed repeatedly,[20] the Safety Act provides that the agency's orders shall be subject to

---

[19] The agency proposed to solicit comments on the issue of predicted usage, particularly of detachable passive belts, and proposed guidelines for studies of this issue. It also solicited proposals for other regulatory alternatives. Finally, the agency outlined steps it was taking to develop a program for voluntary introduction of airbag options in new car lines, including the possibility of participation of federal government fleets in this demonstration program. App. 132a-138a.

[20] App. 4a, 25a, 26a, 28a, 32a, 49a, 56a, 62a, 68a. *See* 15 U.S.C. §§ 1392(b), 1410b(c)(2).

judicial review under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("Section 706(2)(A)"). Despite this clear mandate, the court of appeals concluded that "[t]he appropriate scope of judicial review remains the most troublesome question in this case . . . ." App. 25a. The court held that this same arbitrary and capricious standard of review "should be given different scope in different contexts" (App. 29a), "depending in part on 'the nature of the particular problem faced by the agency.'" App. 26a. The court devoted 25 pages to an effort at "formulating" the particular meaning it deemed to be "appropriate" for the arbitrary and capricious standard in this case. *See* App. 24a-49a. What it formulated was a judicial license to intrude on the agency's "essentially legislative" [21] discretion by interpreting congressional activities that it conceded did not "carr[y] the weight of positive law" (App. 31a, 46a) as a basis for overruling NHTSA's determinations as "arbitrary and capricious." This admittedly "unusual" (App. 32a) expansion of the "arbitrary and capricious" standard infects every aspect of the court's review.[22] It has no precedent in the deci-

---

[21] *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (upholding Standard 202).

[22] Though recognizing that the provisions of the Safety Act itself gave the agency discretion whether or not to issue a regulation like Standard 208 (App. 31a), the court variously stated that NHTSA's decisions must be "in accordance with the purposes for which power has been delegated" (App. 4a); that "an agency is not a legislature" (App. 31a); that in this case there are "'danger signals' that the will of Congress is being ignored" (App. 31a); that agencies "have no authority to act inconsistently with their statutory mandate" (App. 32a); that it was required to consider "the extent to which NHTSA's action may be inconsistent with the congressional purpose" (*id.*); that searching review was essential "lest the congressional will be ignored" (App. 46a); that "NHTSA is not writing on a clean slate" (App. 47a); that scrutiny depended upon the extent of "deviat[ion] from congressional expectations"

sions of this Court or any other court,[23] and if left unreviewed would substantially undermine the APA's careful division of responsibilities among Congress, agencies, and the courts.

As a unanimous Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978), the APA was "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'"[24] The scope of review under the "arbitrary and capricious"

---

and "the path marked by Congress" (App. 48a); that NHTSA "violates its basic legislative mandate" (App. 49a); that "NHTSA lost sight of its statutory obligation" (App. 56a); that "NHTSA errs when it presumes that it knows how to speak more clearly than Congress" (App. 60a); that "NHTSA may not confuse its role with that of Congress" (App. 71a); and that "agencies may not ignore the mandate they have received from Congress" (App. 74a).

[23] A number of lower court opinions address the distinction between "arbitrary and capricious" and "substantial evidence" review, which latter standard the court held inapplicable in this case. App. 26a-28a. *See National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 829-30 & n.23 (D.C. Cir. 1980). Other cases distinguish between the "circumspection" required in substantive review of rules "in an area fraught with scientific uncertainty" and the rigorous review in executing the traditional judicial functions of "interpreting statutory directives and enforcing procedural rectitude." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978). *Compare* 5 U.S.C. § 706(2)(A) *with id.* § 706(2)(C) *and id.* § 706(2)(D).

Here, the court of appeals upheld the agency's factual findings. App. 50a-51a. It recognized that "there is no claim that the agency has exceeded its jurisdiction" under the Safety Act. App. 31a. And it "d[id] not reach" any claim of procedural error. App. 60a n.34.

[24] Changes in this formula are, of course, within the prerogative of Congress, although efforts to alter Section 706(2)(A) to provide for greater judicial scrutiny of agency rulemaking have met with strong opposition. *See, e.g.*, H.R. Rep. No. 435, 97th Cong., 2d Sess. 72-80 (1982) (rejecting Bumpers amendment).

standard is in every case "a narrow one," [25] because when the agency acts "pursuant to the legislative authority delegated by Congress, [it] exercises the prerogatives of the legislature." *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 663 (1980) (Burger, C.J., concurring). The court's use of legislative materials postdating the agency's governing statute to label as arbitrary and capricious under Section 706(2)(A) what clearly was not "in excess of statutory . . . authority" under Section 706(2)(C) [26] improperly expands the established limits of the arbitrary and capricious standard of review.

As the court of appeals recognized, none of the three instances of legislative activity during the years following the Safety Act on which it relied to legitimize its expanded scope of arbitrary and capricious review "carries the weight of positive law." App. 46a. The first instance was Congress' failure to prohibit a mandatory passive restraint standard in 1974, when it *did* prohibit compliance by means of ignition interlocks or continuous buzzers for seatbelts and *did* impose a congressional veto procedure for any future airbag standard. *See* App. 33a-36a. Whatever this failure may say about the intentions or motives of individual members of the House or Senate would be a hazardous speculation for any court.[27] But the only relevant

---

[25] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *accord, Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803 (1978).

[26] See App. 31a: "Even when there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, . . ." (citing 5 U.S.C. § 706(2)(C)).

[27] The accuracy of the court's measurement of the congressional pulse is open to serious question. We believe it unnecessary to address this issue in detail in this Petition; the point here is that Congress did not alter the agency's broad discretion under the Safety

fact on review of NHTSA's action under the arbitrary and capricious standard in this case is that in 1974 Congress did *not* alter the agency's statutory discretion to decide whether to impose mandatory passive restraints in the first instance. Nor did Congress do so in 1977, when legislative veto resolutions disapproving the mandatory passive restraint standard were tabled in both houses. *See* App. 36a-38a.[28] The court's further reliance upon a third period of legislative activity—proposed amendments that did not find their way into NHTSA's 1980 authorization bill—is equally novel. It would require courts to draw inferences of "arbitrary" or "capricious" agency action based solely on their own interpretations of the internal parliamentary rules of the Senate and House of Representatives.[29]

Act. It never directed NHTSA to enact any mandatory passive restraint requirement and never took any legislative action approving NHTSA's prior issuance of such a requirement.

[28] The court's negative inference from the failure of legislative veto resolutions is particularly far-reaching. Even assuming its constitutionality, *see Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3244 (U.S. October 5, 1981), *restored for reargument*, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982), Congress expressly provided that the veto procedure "shall not impair any right which any person may have to obtain judicial review" of Standard 208 or any other safety standard. 15 U.S.C. § 1410b(e). While petitioners do not seek review of Standard 208 in this case, the clear purpose of Section 1410b(e) is to prevent precisely the sort of negative inference drawn by the court of appeals.

[29] The court of appeals relied upon a conference report revision that would have both prohibited NHTSA from barring fully detachable passive belts and required it to impose optional airbag requirements on at least one car line per manufacturer. This conference report failed to pass the House by the two-thirds vote that the rules of that body required under the circumstances. App. 38a-46a. Thus, it was not enacted, and did not limit the agency's discretion under the Safety Act—just as another House amendment to the same bill, which would have *prohibited* mandatory passive restraints, was not passed in the House when it, too, garnered only a majority vote. App. 45a-46a.

Reliance on any of the foregoing activities would be a highly questionable way of ascertaining the meaning of the Safety Act.[30] But the court's unprecedented use of them in this case to alter the meaning of arbitrary and capricious review was nothing short of an exercise in "substitut[ing its] judgment" for that of the agency delegated authority to resolve these essentially legislative questions. The court's decision thereby clearly conflicts with this Court's leading decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The court's fundamentally misguided view of the separation of powers incorporated in Section 706(2)(A) poses serious consequences for the future of the court-agency "partnership." [31] The court's decision here is of special concern, for, as this Court has acknowledged, "the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit." [32] Because of its broad threat to the policy-making functions of Congress and the administrative agencies, the decision below warrants review by this Court.

---

[30] Even the legislative history of subsequent *statutes* carries little if any weight in ascertaining the meaning of earlier statutes. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980). Post-enactment oversight activities are even less reliable for that purpose. *See TVA v. Hill*, 437 U.S. 153, 189-91 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). In this case, the court of appeals was using subsequent legislative events (and non-events), not as aids to statutory interpretation, but to "formulate" a new standard of judicial review under the APA.

[31] *See generally Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

[32] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.14 (1978).

II. BY IMPOSING ITS OWN POLICY PREFERENCE THAT REGULATIONS MUST REMAIN IN PLACE UNLESS THEY CAN BE *PROVEN* INEFFECTIVE, THE COURT BELOW HAS POSED A SERIOUS CHALLENGE TO THE CONTINUED ABILITY OF ADMINISTRATIVE AGENCIES TO EXERCISE THEIR DELEGATED STATUTORY AUTHORITY.

The court of appeals recognized that "the course of administrative action is frequently and inevitably characterized by shifts and turns, as agencies continually reassess what is in the public interest." App. 48a. But here the court held "arbitrary and illogical" (App. 49a) an agency decision in 1981 to rescind a 1977 regulation before its effective date for reasons the court conceded would have been upheld as a basis for not adopting the regulation in 1977. It accepted the agency's view that compliance would be achieved almost entirely by installation of passive belts that are detachable, and agreed that "[t]here may well be 'substantial uncertainty'" about increased occupant use of such belts. And it specifically held that, had "substantial uncertainty" on this point existed in 1977, NHTSA could not have issued the rule in the first instance. App. 50a-51a. But the court held that the agency, having once issued the rule, had to meet a higher standard of rationality in changing its regulatory policy to meet the new circumstances that had arisen:

> "[T]he question is not whether evidence shows that usage rates will increase by the necessary amount [if the standard takes effect], but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so." App. 51a.

The clear result is to impose a policy preference for more rather than less regulation under the guise of the arbitrary and capricious test. The court held that in order to rescind a regulation (even one that had not yet

taken effect), the agency must establish more than a reasonable basis for doubt, after notice and comment, whether the regulation continued to meet the statutory requirements. Rather, under the court's decision the agency must meet the higher burden of establishing affirmatively that those statutory requirements are *not* met. This unprecedented judicial presumption in favor of continued regulation—which has already been followed by the court of appeals in a more recent case[33]—is plainly contrary to the language of the Administrative Procedure Act and the decisions of this Court and threatens the vitality of the entire administrative process.

As this Court has long held, "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). *See also NLRB v. Iron Workers Local 103*, 434 U.S. 335, 351 (1978). Adaptability is the real genius of the modern administrative process:

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967).

This flexibility is especially appropriate and necessary in the promulgation of rules of general applicability.[34] An

---

[33] *See Natural Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982), slip. op. at 19 n.41 (quoting *State Farm*):

> "EPA 'has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently can no longer be expected to do so' " (brackets in original).

[34] *See generally National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680-84 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Indeed, although not requiring agencies to formulate new policy

agency engaged in making the essentially legislative judgments of rulemaking should be permitted to adapt its policy not only to take account of "[c]hanges . . . in objective circumstances," but also to provide for changes "in the way the agency perceives the critical facts." *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-94 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *cert. denied*, 431 U.S. 974 (1977).[35] In fact, where basic changes in the regulatory environment have occurred, agencies may well be *required* to alter past regulatory policies, by statute or even by the requirements of the Constitution. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) (upholding Fifth Amendment challenge to post-war continuation of rent regulations). In *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979)—a decision relied upon by the court below (App. 32a)—the FCC was required to reconsider certain cable television copyright rules because the FCC was "plainly . . . unprepared to say that the regulations were [still] consistent with the public interest."

This case, of course, does not raise the question whether, if NHTSA had exercised its statutory discretion to con-

---

through rulemaking, this Court has suggested that rulemaking is especially appropriate for undertaking this legislative task. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-95 (1974) (failure to use rulemaking in departing from prior decisions was not an abuse of agency discretion).

[35] Of course, a "departure from prior norms" must be "clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). *See also NAACP v. FCC*, No. 80-2416 (D.C. Cir. June 29, 1982), slip op. at 7-8 (upholding FCC's rescission of top 50 policy where the agency adequately set forth its view of changed circumstances). But here the court required far more than that, because it conceded that an agency's refusal to adopt the passive restraint requirement would have been upheld in 1977 had the facts been then as the court agreed they were in 1981.

tinue rather than rescind the passive restraint requirement, such a decision would have violated the Safety Act. The question here is whether NHTSA was entitled to exercise its statutory discretion one way rather than another. NHTSA's decision was simply one further stage of a novel and controversial regulatory program that had already undergone dramatic "shifts and turns" (App. 48a), as the agency reevaluated the requirements originally proposed in 1969. Like Secretary Coleman in 1976, and like Secretary Adams in 1977, Secretary Lewis reconsidered the need for passive restraints. Like Adams' previous "departure from prior norms," *see* note 35 *supra* —which was upheld as a proper exercise of administrative discretion though it reversed the course adopted by Coleman only six months before[36]—this determination was preceded by a full period of public comment and a reasoned articulation of the basis for the agency's decision. In fact, here—unlike the Adams decision—the agency identified important changes in the regulatory environment, changes that made critical for the first time the accuracy of agency judgments regarding the expected use of passive seatbelts.[37]

Despite these fundamental changes, the court caustically rejected NHTSA's reevaluation. In doing so, it offered no reason why the discretion of agencies to alter their regulatory policies upon "[c]hanges . . . in objective circumstances" or "in the way the agency perceives the critical facts," *FTC v. Texaco, Inc.*, *supra*, 555 F.2d at 893-94, should be any less applicable where the agency seeks to suspend, rescind, or modify existing rules—especially prospective ones—than when it adopts, or decides against adopting, entirely new rules. The court specifically recognized that this issue presented "a matter of first impression" (App. 25a), but the only rationale of-

---

[36] *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[37] *See* pages 6-7 *supra*.

fered by the court was its *own* presumption that regulations "can . . . be expected" to have continuing justification.[38] Absent a specific direction by Congress, however, it is certainly rational for an agency to decide, as NHTSA did here,[39] that major regulatory burdens should continue only as long as they can be shown to be achieving an identifiable statutory goal or purpose.

The court's unprecedented holding is plainly inconsistent with *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), in which this Court strongly counseled the lower courts against substituting their policy preferences for the considered judgments of agencies that prior regulatory policies have become outmoded. There, the FCC had concluded that it "would have no assurance" that a continuation of its policy of regulating radio program formats would provide any greater listener satisfaction than that resulting from the marketplace incentives of broadcasters. *See id.* at 595-96. The court of appeals invalidated the FCC's policy statement, reading into the Communications Act an obligation to scrutinize changes of format at the time of transfer or renewal. This Court reversed, upholding the agency's determina-

---

[38] There is certainly no factual basis for the court's presumption in this case. The "regulation once considered [by the agency] to prevent deaths and injuries efficiently" was based on the prediction that 60% of all cars would have airbags, and the *assumption* that some 60 to 70% of the occupants of cars equipped with passive belts would use them. This 60-70% figure was purely an assumption—not a finding—and was irrelevant to the decision to adopt a mandatory passive restraint requirement since the finding of 60% airbag usage was sufficient to justify the safety benefits of the standard. *See* page 6 *supra*. Before Notice 25 the agency never had occasion to examine seriously the question of usage rate for passive belts.

[39] Notice 25 stated that "NHTSA has a duty under the Vehicle Safety Act and E.O. 12291 to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy." App. 93a.

tion to abandon format regulation as a judgment "entitled to substantial judicial deference." *Id.* at 596. In doing so, it applied precisely the same deference to a policy of not regulating in conditions of regulatory uncertainty applicable to decisions to regulate under such conditions.[40]

The court of appeals in this case intruded even further into the realm of agency decisionmaking. In remanding the case, the majority emphasized that NHTSA would have to consider a wide range of alternatives to rescission—including a number pressed by the court but never proposed in rulemaking, most notably an "airbags only" standard. App. 54a-68a. This requirement to canvass additional alternatives would certainly have been inconsistent with this Court's decision in *Vermont Yankee* in the context of an original decision whether to issue a standard,[41] and the court did not suggest that such an undertaking could have been required. It was no more lawful to do so here simply because the agency determined to rescind its prior regulation. An agency need not consider every alternative, or solve every regulatory problem, before deciding upon a present course of action.[42] Here, as in 1976, the agency did not *foreclose*

---

[40] *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 528 n.52 (1981); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 699-701, 706, 722-23 (1980) (Marshall, J., dissenting).

[41] In *Vermont Yankee*, this Court not only limited the power of reviewing courts to impose additional procedures on an agency proceeding in conformity with the APA, but also specifically rejected a challenge, under NEPA, to the failure to consider alternative regulatory policies. *See* 435 U.S. at 551.

[42] *See REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967).

This freedom of the agency to control its own docket is particularly essential in NHTSA's case, for the Safety Act specifically contemplates a procedure of readjustment of safety standards in light

further rulemaking to consider the policy alternatives set forth by the majority in its opinion; it simply decided that it could not at this time justify continuing the mandatory passive restraint portion of the standard on the present record. *See* pages 8-9 *supra*. The majority's determination that the agency must consider a wide range of other regulatory alternatives because in their view under conditions of uncertainty continued regulation in some form is presumed to be better than none is simply not a determination that the courts of appeals are permitted to make.[43]

The error of the decision below has particular significance today. There is now widespread agreement throughout the American political spectrum with the view that existing regulations must be carefully reexamined to ensure that they do not pose undue regulatory burdens upon economic efficiency.[44] This "regulatory reform" movement has received endorsement not only from Con-

---

of changes in the regulatory environment and advances in relevant safety technology. *Chrysler Corp., supra*, 472 F.2d at 680. *See also* 15 U.S.C. § 1410a (statutory procedure for petitioning NHTSA to issue an order in a standards proceeding).

[43] The court's dominating preference for regulation shows up elsewhere. At the outset of its opinion, the court quoted the Safety Act's requirement that standards must be "practicable" and "meet the need for motor vehicle safety." App. 5a; *see* note 3 *supra*. From there on, the practicability requirement—and the agency's specific findings on this point—drop completely out of the court's analysis. Balancing the "practicable" and "safety need" criteria is, of course, one of the difficult but vital tasks delegated to the agency by Congress, which specifically defined motor vehicle safety in terms of "unreasonable" risk. 15 U.S.C. § 1391(1).

[44] NHTSA estimated that its action saved $1 billion annually in variable manufacturing costs and consumer costs and an additional $150 million annually in fuel costs saved by the continued installation of active belts. App. 117a.

gress [45] but also from the Executive Branch and the independent regulatory agencies. In Executive Order No. 12291, 46 Fed. Reg. 13193 (1981), the President established a formal program for agency review of "major" regulations, applicable to agencies other than independent regulatory agencies, whose goal is to identify and eliminate outmoded regulatory programs. The guiding premise of the regulatory review program is that "the federal government should not regulate unless there is a demonstrated need." [46] A wide variety of major regulatory programs have been in various stages of review and reformulation, not only under this Executive Order [47] but also by independent regulatory agencies under their own initiatives.[48] A number of actions taken as a result of these reviews have already been challenged in the federal courts.[49] The decision below raises a formidable

---

[45] *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351; Federal Trade Commission Improvements Act of 1980 §§ 11, 15, Pub. L. No. 96-252, 94 Stat. 374; Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164; Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

[46] *See* Presidential Task Force on Regulatory Relief: Reagan Administration Achievements in Regulatory Relief ii (August 1982).

[47] Since January 1981, the Task Force has designated 111 existing regulatory programs for high-priority agency review. Already 51 of these programs have been revised or rescinded; 35 more are currently subject to deregulation proposals, generally under notice-and-comment procedures similar to that employed by NHTSA in this case. *See id.* at 3-37.

[48] *E.g.*, *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *appeal pending sub nom. Office of Communication of the United Church of Christ v. FCC*, Nos. 81-1032 *et al.* (D.C. Cir.); 47 Fed. Reg. 36453 (1982) (proposing elimination of FCC program logging requirements).

[49] *See Natural Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982); *Natural Resources Defense*

judicial obstacle to these regulatory policy judgments in favor of deregulation and should not go unreviewed by this Court.

III. THE COURT'S AUGUST 4 ORDER IMPERMISSIBLY PREEMPTED THE AGENCY'S PRIMARY JURISDICTION TO MAKE THE FURTHER DETERMINATIONS REQUIRED BY THE COURT'S OPINION.

In remanding this case, the court of appeals raised a number of questions for NHTSA's further consideration,[50] noting that "[o]ur decision does not foreclose rescission . . . ." App. 72a. Even on the present record, the court apparently held, NHTSA "could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed." App. 54a.[51] The court asked that NHTSA "recommend" to it a timetable for agency analysis of the issues raised in the court's opinion. App. 72a. It specifically rejected requests to set an effective date, since the question of what if any passive restraint requirement would be appropriate had not yet been determined by NHTSA. *Id.*

On August 4, however, the court made two fundamental changes in direction, without giving NHTSA (or

---

Council, Inc. v. EPA, No. 81-2068 (3d Cir. July 8, 1982); *Deregulation of Radio*, *supra*; *International Ladies' Garment Workers Union v. Donovan*, Civil Action No. 81-2606 (D.D.C. July 23, 1982); *Center for Science in the Public Interest v. Department of the Treasury*, Civil Action No. 82-0610 (D.D.C.).

[50] The court specifically acknowledged that "changed factors—higher gasoline prices, smaller cars, an ailing automobile industry, and the methods of compliance being pursued by that industry—may fully justify reassessing, modifying, and even deferring the effective date of the regulations . . . ." App. 74a.

[51] Since Notice 25 expressly leaves open the possibility of future rulemaking leading to a new passive restraint requirement (*see* page 9 *supra*), the court's distinction between suspension and rescission is not apparent.

these petitioners) either notice or opportunity for comment. First, although finding NHTSA's recommended timetable "not inconsistent" with its prior order, the court neither adopted nor rejected that timetable, apparently leaving the course of further proceedings to NHTSA's discretion. But the court reinstated Standard 208 and extended its effective date to September 1, 1983. It thereby reversed its June 1 decision not to fix that or any other date but to leave the matter of effective dates to NHTSA, as the statute expressly provides.[52] Because of this action manufacturers are faced with an insoluble dilemma. Regardless of the amount of human and financial resources they may devote (assuming their availability in the necessary measure) to an effort to comply with Standard 208, some or all of them may still find themselves in a position where they may not lawfully sell their cars because they do not comply with that standard as it may emerge from the additional rulemaking foreshadowed in the June 1 opinion. The June 1 opinion recognized this dilemma, noting that manufacturers "would justifiably feel uncertain about the technology that satisfies . . . Modified Standard 208." App. 72a.

Second, by naming that effective date (or any other date), the court cast aside its earlier commitment to an orderly process in which the agency would first conduct proceedings to resolve the issues raised in the court's June 1 opinion and then determine any appropriate revised effective dates for whatever standard, if any, it might adopt. While the court requested the agency to report by October 1 whether the September 1, 1983 effective date was "achievable," [53] it emphasized that the September 1, 1983 date is presently binding. App. 80a, 81a-82a.

---

[52] 15 U.S.C. § 1392(c) provides NHTSA with authority to extend the effective date of federal motor vehicle safety standards. *See Chrysler Corp., supra*, 472 F.2d at 673.

[53] The applicable statutory criterion—"practicable"—delegates a considerably different policy judgment to the agency. 15 U.S.C. §§ 1391(2), 1392(a).

We respectfully submit that the court's action unlawfully invades the primary jurisdiction of the agency, upon remand, to determine in the first instance whether, when, and in what form any mandatory passive restraint requirements should be adopted, and what procedures should appropriately be used to answer these questions. As this Court cautioned in *Vermont Yankee*:

> " 'At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." ' " 435 U.S. at 544-45, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

See also NLRB v. Pipefitters Local 638, 429 U.S. 507, 522 n.9 (1977).[54]

This Court has on numerous occasions strongly counseled the courts of appeals not to assume such functions delegated by Congress to the agency in the first instance. In *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 817-26 (1973), the district court had overturned an ICC rate increase and entered in-

---

[54] The Sixth Circuit recognized these established guidelines when, after invalidating the compliance procedures of NHTSA's passive restraint requirement, it delayed the effective date of that requirement "until a reasonable time [to be determined by the agency] after [new] test specifications are issued." *Chrysler Corp., supra*, 472 F.2d at 681.

junctive relief against the carriers, prohibiting the imposition of increased rates pending remand. This Court held such an injunction unlawful, and in disregard not only of the particular statutory scheme involved in that case but also of "the division of function which the legislature has made between the administrative body and the court of review." *Id.* at 819. As the Court observed, for the court of appeals to articulate its own beliefs about such public policy questions "prior to an expression by the Commission of its view" is "precisely what the doctrine of primary jurisdiction is designed to avoid." *Id.* at 821. Failure to adhere to these principles is such plain error that it has merited summary reversal. *E.g.*, *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981); *Long Island R.R. v. Aberdeen & Rockfish R.R.*, 439 U.S. 1, 4-6 (1978).

Federal courts abuse their authority and venture outside their limited role in the administrative process when they attempt to reinstate regulations *sua sponte*.[55] In this case, the court of appeals' disposition pending remand apparently proceeded from its own policy view that "[t]he implementation of a passive restraint standard has already been delayed without acceptable reasons, perhaps unconscionably so." App. 72a. Whether that view of a long and difficult rulemaking process is accurate or not—and petitioners submit it is not—it did not jus-

---

[55] The Fifth Circuit recognized the dangers of such judicial efforts in *Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1101 (5th Cir. 1976), where it reversed a district court order mandating immediate reinstitution of prior regulations held to have been unlawfully revoked by USDA, as "total displacement . . . of the Secretary's function" not warranted by the district court's equity powers. *See also Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1268-69 & n.7 (D.C. Cir. 1981) (giving effect to rescission of rule pending judicial review of rescission in court of appeals and this Court).

tify the court's arbitrary orders establishing effective dates for rules that concededly remain within the agency's discretion to suspend, modify, or even rescind. Courts are not legislatures, and they do not sit to enact regulatory programs.

CONCLUSION

For the foregoing reasons, petitioners pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PEÑA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner Automobile Importers of America, Inc.

August 30, 1982